UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Consumer Protection

September 4, 2024

The Honorable Gavin Newsom
Governor of California
1021 O Street, Suite 9000
Sacramento, CA 95814

Dear Governor Newsom,

I understand that you are considering signing "click-to-cancel" legislation to address automatic renewal and continuous service offers, two forms of negative option offers.[1] As the Director of the Bureau of Consumer Protection of the Federal Trade Commission ("FTC"), I write to provide information about the FTC's efforts to address harmful practices related to negative option marketing. The views in this letter are my own and do not necessarily reflect the view of the FTC or any individual Commissioner.

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. But far too often, companies manipulate consumers into making recurring payments for goods that the consumers never intended to purchase or did not want to continue buying. Over the years, deceptive and unfair negative option practices—such as failing to make adequate disclosures, billing consumers without their consent, or making cancellation difficult or imposing—have been a persistent source of consumer harm.

Enforcement Efforts

The FTC has regularly brought cases against negative option marketers alleging violations of Section 5 of the FTC Act, 15 U.S.C. § 45(a), the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. §§ 8401–8405, the Telemarketing Sales Rule, 16 CFR part 310, and other laws and regulations that address aspects of negative option marketing.[2] These matters have addressed a wide variety of practices, including inadequate disclosures of hidden charges in ostensibly "free" offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.[3] For example, the

[1] Negative option offers come in a variety of forms, all of which share a central feature: each contain a term or condition that allows a seller to interpret a consumer's silence, or failure to take an affirmative action, as acceptance of an offer.

[2] These authorities include the Rule on the Use of Prenotification Negative Option Plans, 16 CFR part 425, the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693–1693r, and the Postal Reorganization Act (i.e., the Unordered Merchandise Statute), 39 U.S.C. § 3009.

[3] Recent examples of these matters include: *United States v. Adobe Inc.*, No. 5:24-cv-03630 (N.D. Cal. 2024); *FTC v. FloatMe*, 5:24-cv-00001-XR (W.D. Tex. 2024); *FTC v. Doxo, Inc.*, 2:24-cv-00569 (W.D. Wash. 2024); *FTC v. Amazon.com, Inc.*, 2:23-cv-00932 (W.D. Wash. 2023); *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-06435 (D.N.J.

FTC recently took action against Adobe and two of its executives, alleging that they trapped customers into year-long subscriptions through hidden early termination fees and numerous cancellation hurdles. And earlier this year, the FTC charged online cash advance provider Float Me and its co-founders with using false promises of free money advances to lure consumers into signing up for subscriptions, then using manipulative design features to make it difficult for consumers to cancel.

Research and Outreach

Alongside its enforcement and rulemaking initiatives, the FTC has engaged in research and outreach to address issues related to negative option offers. The FTC hosted a workshop in 2007 on negative option marketing,[4] followed by a 2009 staff report covering topics such as disclosures, consumer consent, and appropriate cancellation procedures.[5] More recently, in November 2021, the Commission published an "Enforcement Policy Statement Regarding Negative Option Marketing" to provide guidance regarding its enforcement of various statutes and FTC regulations.[6] The statement explained that with respect to deceptive and unfair negative option practices, "[t]he number of ongoing cases and high volume of complaints demonstrate that there is prevalent, unabated harm in the marketplace."

In April 2021, the FTC hosted a public workshop on digital dark patterns—design choices that can trick or manipulate consumers into buying products or services, or giving up their privacy.[7] Although the workshop explored user interfaces in a variety of different contexts, several participants highlighted examples of dark patterns related to subscriptions. The FTC's staff report on the workshop, *Bringing Dark Patterns to Light*, provides several examples of such dark patterns, including "free offers" with fine print disclosures that purport to lock consumers into ongoing payments, and cancellation paths that force consumers to take a difficult-to-find, confusing maze of website prompts in order to request a refund.

2022); *FTC v. Age of Learning, Inc.*, 2:20-cv-07996 (C.D. Cal. 2020); *FTC v. AH Media Group, LLC*, 3:19-cv-04022-JD (N.D. Cal. 2019); *FTC* v. *Triangle Media Corp.,* 3:18-cv-01388-LAB-LL (S.D. Cal. 2019); *FTC* v. *Credit Bureau Ctr., LLC,* No. 17-cv-00194 (N.D. Ill. 2018); *FTC* v. *JDI Dating, Ltd.,* No. 1:14-cv-08400 (N.D. Ill. 2018); *FTC, Illinois, and Ohio* v. *One Techs., LP,* No. 3:14-cv-05066 (N.D. Cal. 2014); *FTC* v. *Health Formulas, LLC,* No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC* v. *Nutraclick LLC,* No. 2:16-cv-06819-DMG (C.D. Cal. 2016); *FTC* v. *XXL Impressions,* No. 1:17-cv-00067-NT (D. Me. 2018); *FTC* v. *AAFE Products Corp.,* No. 3:17-cv-00575 (S.D. Cal. 2017); *FTC* v. *Pact Inc.,* No. 2:17-cv-1429 (W.D. Wash. 2017); *FTC* v. *Tarr,* No. 3:17-cv-02024-LAB-KSC (S.D. Cal. 2017); *FTC* v. *AdoreMe, Inc.,* No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC* v. *DOTAuthority.com, Inc.,* No. 0:16-cv-62186-WJZ (S.D. Fla. 2018); *FTC* v. *Bunzai Media Group, Inc.,* No. CV15-04527-GW(PLAx) (C.D. Cal. 2018); and *FTC* v. *RevMountain, LLC,* No. 2:17-cv-02000-APG-GWF (D. Nev. 2018).

[4] FTC, "Negative Options: A Workshop Analyzing Negative Option Marketing," https://www.ftc.gov/news-events/events/2007/01/negative-options-workshop-analyzing-negative-option-marketing.

[5] FTC, "Negative Options: A Report by the Staff of the FTC's Division of Enforcement" (January 2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshopanalyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf.

[6] Press Release, *FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions* (Nov. 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions f.

[7] FTC Workshop, Bringing Dark Patterns to Light, https://www.ftc.gov/news-events/events/2021/04/bringing-dark-patterns-light-ftc-workshop.

Proposed "Click-to-Cancel" Rulemaking

In October 2019, the FTC published an advance notice of proposed rulemaking ("ANPR") to solicit public comment on the need for amendments to the Commission's "Rule Concerning the Use of Prenotification Negative Option Plans," also known as the "Click-to-Cancel" or "Negative Option Rule."[8] The ANPR requested comments on the current rule, as well as whether and how it should use its rulemaking authority to address prevalent unfair or deceptive practices involving negative option marketing. Many comments provided examples or statistics indicating that deceptive negative option practices continue to be prevalent, with some describing particular issues with free trials.

After reviewing the comments, on March 2023, the FTC issued a notice of proposed rulemaking ("NPRM") that would amend the rule in several ways, including changes to make it easier for consumers to "click to cancel" recurring subscriptions and memberships. The proposed rule would apply to all forms of negative option marketing. Among other things, it would: prohibit misrepresentations regarding material facts regarding any aspect of the negative option transaction, including facts related to the underlying product or service; require sellers to provide basic information about the negative option offer prior to obtaining a consumer's billing information; require sellers to obtain a consumer's express informed consent before charging the consumer; and require sellers to provide a cancellation mechanism that is at least as simple as the one used to initiate the charge or series of charges. The proposed rule would not supersede, alter, or affect state statutes or regulations relating to negative option marketing, except to the extent that a state statute, regulation, order, or interpretation is inconsistent with the proposed Rule.[9] The FTC received more than 1,100 comments on the NPRM, and FTC staff is currently analyzing the comments to determine the appropriate next steps.

I hope that the FTC's work provides useful insight as you consider legislation addressing automatic renewal and continuous service offers in California. To the extent the Federal Trade Commission can provide assistance with these inquiries, please do not hesitate to contact me.

Very truly yours,

Samuel Levine
Director, Bureau of Consumer Protection
Federal Trade Commission

Cc: The Honorable Pilar Schiavo, California State Assembly

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[8] FTC, Advanced Notice of Proposed Rulemaking (Oct. 2, 2019), https://www.federalregister.gov/documents/2019/10/02/2019-21265/rule-concerning-the-use-of-prenotification-negative-option-plans

[9] The proposed Rule also indicates state requirements are not inconsistent with the Rule to the extent they afford greater protection to consumers.